

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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January 17, 2018

The Honorable Trey Gowdy
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

We are writing to request that you issue a subpoena to compel the Department of Homeland Security to produce a full, unredacted copy of a report completed more than three months ago by the Inspector General relating to President Donald Trump's first attempt at banning Muslim immigrants and visitors from the United States.

The Department has been blocking the Inspector General from delivering its report to Congress based on spurious legal arguments, and our Committee would be forsaking its constitutional oversight responsibilities if we allow this ongoing abuse to stand.

If you decline to issue this subpoena yourself, then we request that you allow Committee Members to debate and vote on a motion to subpoena the Department at our next regularly-scheduled business meeting.

Background on Inspector General Report

On January 27, 2017, President Trump issued Executive Order 13769, the initial iteration of his order banning immigrant and non-immigrant visa applicants from seven predominantly Muslim countries.¹ On February 8, 2017, 38 Members of Congress sent a letter to Inspector General John Roth requesting that his office launch an investigation in light of multiple reports of coercive actions taken by Customs and Border Patrol (CBP) agents in response to the Executive Order, including the denial of access to legal counsel.²

¹ Executive Order 13769, *Protecting the Nation from Foreign Terrorist Entry into the United States* (Jan. 27, 2017) (online at www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states).

² Letter from Members of Congress to Inspector General John Roth, Department of Homeland Security (Feb. 8, 2017) (online at serrano.house.gov/media-center/press-releases/congressman-serrano-leads-call-thorough-investigation-muslim-ban).

On October 6, 2017, Inspector General Roth completed his 87-page report and delivered it to Department leadership.³

However, on November 20, 2017, Inspector General Roth took the highly unusual step of sending Congress a letter warning that the Department was seeking to censor many portions of the report by using unprecedented and expansive claims of “attorney-client privilege” and “deliberative process privilege.”⁴

Inspector General Roth explained that he was “very troubled” by these developments, writing:

Unfortunately, notwithstanding having received the report over six weeks ago, the Department has not, as we typically request in these matters, made a final determination of what portions of the report contain material covered by the attorney-client privilege, nor have they made a decision as to whether they will claim the privilege or, alternatively, waive the privilege to allow such portions to be released to Congress and the public. Last week, they told us that they are unable to give us an estimate of when they will make these decisions.

Additionally, Department leadership has indicated that they are also reviewing the document for material covered by the “deliberative process privilege,” and have yet to decide whether they will invoke that privilege, which would prevent us from releasing to you significant portions of the report. I am very troubled by this development.⁵

With respect to the assertion of the deliberative process privilege, Inspector General Roth wrote:

I am particularly troubled by the Department’s threat to invoke the deliberative process privilege, as this is the first time in my tenure as Inspector General that the Department has indicated that they may assert this privilege in connection with one of our reports or considered preventing the release of a report on that basis. In fact, we regularly have published dozens of reports that delve into the Department’s rationale for specific policies and decisions, and comment on the basis and process on which those decisions were made. Indeed that is at the heart of what Inspectors General do.⁶

He continued:

³ Letter from Inspector General John Roth, Department of Homeland Security, to Members of Congress (Nov. 20, 2017) (online at democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/Signed%20Letter%20to%20Members%20of%20Congress.pdf).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

With regard to this specific report, it would deprive Congress and the public of significant insights into the operation of the Department. Moreover, because we have concluded that CBP appears to have violated at least two separate court orders, we will be unable to describe the factual basis behind our conclusion.⁷

The week after Inspector General Roth sent his warning letter to Congress, then-Acting Secretary Elaine Duke testified before the House Committee on Homeland Security on November 30, 2017, that the Department was, in fact, asserting attorney-client and deliberative process privileges to block the release of the report to Congress, but that the scope of those privileges had not yet been fully determined. She testified: “to be absolutely sure ... we have ordered a third-party independent review to make sure that the privileges that we need to redact that report are sound.”⁸

In addition, on December 28, 2017, the Department’s invocation of the “deliberative process privilege” caused the report to be “withheld in full” from a valid Freedom of Information Act request filed by Open the Government and the Project on Government Oversight, organizations dedicated to government transparency.⁹

The Oversight Committee’s Responsibility to Protect Inspectors General

It has now been three months since Inspector General Roth completed his report, but the Department is still blocking its delivery to Congress. The Department’s actions directly contradict the Inspector General Act, which requires the Inspector General to keep Congress “fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action.”¹⁰ The Department’s actions also prevent Congress from fulfilling its fundamental responsibilities to conduct oversight of the Department’s compliance with our nation’s laws and our Constitution.

Even if the Department were to assert attorney-client or deliberative process privileges to withhold information from litigants or the American public, those privileges are not recognized by Congress. On May 2, 2017, our Committee, then led by Chairman Jason Chaffetz and Ranking Member Elijah Cummings, sent a bipartisan letter to the Department relating to a

⁷ *Id.*

⁸ *Homeland Security Inspector General Retires Amid Flap Over Travel Ban Report*, CNN (Nov. 30, 2017) (online at www.cnn.com/2017/11/30/politics/dhs-inspector-general-travel-ban/index.html). See also *Watchdog Says Homeland Security Bottling Up Travel Ban Report*, Politico (Nov. 20, 2017) (online at www.politico.com/story/2017/11/20/homeland-security-travel-ban-253902); *Watchdog to Depart DHS After Tensions Over U.S. Travel Ban Report*, Reuters (Nov. 28, 2017) (online at www.reuters.com/article/us-usa-immigration-watchdog/watchdog-to-depart-dhs-after-tensions-over-u-s-travel-ban-report-idUSKBN1DS33R).

⁹ Letter from Office of Counsel, Office of the Inspector General, Department of Homeland Security, to Open the Government (Dec. 28, 2017) (online at democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/2018-IGFO-00033%20Final%20Response.pdf).

¹⁰ 5 U.S.C. App. § 2.

different matter involving a subpoena to the Transportation Security Administration (TSA). They explained:

Although the Committee acknowledges the interests underpinning the attorney-client privilege in judicial proceedings, we reject the claim that an assertion of the attorney-client privilege is a legitimate basis for withholding documents in response to a congressional subpoena.¹¹

The letter continued:

The House of Representatives derives its authority from the United States Constitution and is bound only by the privileges derived therefrom. As the schedule instructions accompanying the subpoena provided, neither the Committee nor the United States House of Representatives recognizes purported non-disclosure privileges associated with the common law. Further, the mere possibility that a common law privilege may apply in a judicial proceeding is not, in and of itself, a legal justification to withhold documents from this Committee or Congress.¹²

You personally reaffirmed this position on November 16, 2017, when you joined Ranking Member Cummings in sending a bipartisan follow-up letter to the Department regarding the TSA matter.¹³ In addition, during our hearing on November 15, 2017, you personally reaffirmed the critical role that Inspectors General play in providing Congress with reports and recommendations based on investigations of internal agency decision-making. You stated:

When defending against waste fraud and abuse, Inspectors General play a critical role within our federal agencies. While congressional oversight is essential, the 73 inspectors general best understand their agency issues and can clearly identify areas in need of reform.¹⁴

At the same hearing, Inspector General Roth testified about the importance of congressional oversight in this process, stating:

¹¹ Letter from Chairman Jason Chaffetz and Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, to Acting Administrator Huban A. Gowadia, Ph.D., Transportation Security Administration (May 2, 2017) (online at oversight.house.gov/wp-content/uploads/2017/05/2017-05-02-JEC-EEC-to-Gowadia-TSA.pdf).

¹² *Id.*

¹³ Letter from Chairman Trey Gowdy and Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, to Acting Secretary Elaine C. Duke, Department of Homeland Security (Nov. 16, 2017) (online at oversight.house.gov/wp-content/uploads/2017/11/2017-11-16-TG-EEC-to-Duke-DHS-OSC.pdf).

¹⁴ House Committee on Oversight and Government Reform, *Hearing on Recommendations and Reforms from the Inspectors General* (Nov. 15, 2017).

OIG's reporting relationship to Congress is a key feature of the Inspector General Act. Inspectors General can only recommend to our agency but we cannot direct our agency. Therefore, congressional oversight plays a critical role in ensuring if department operations, that which get paid attention to, simply put, gets fixed. Probing, fact-based oversight whether done internally by an Inspector General or externally by a congressional committee can help bring about positive change.¹⁵

Request for Subpoena

Allowing Trump Administration political appointees at the Department of Homeland Security to block the Inspector General from delivering his report to Congress merely because it is critical of the President is a clear abuse of authority that hinders Congress' ability to conduct oversight and impairs the effectiveness of the Inspector General's efforts.

For these reasons, we request that you issue a subpoena to compel the Department to produce, by January 30, 2018, a full, unredacted copy of the Inspector General's report, as well as the full corresponding case file, including all associated exhibits, attachments, interview summaries, and other work papers.

If you choose not to do so, then we ask that you place this matter on the agenda for our next regularly scheduled business meeting so that all Committee Members will have the opportunity to vote on a motion to issue this subpoena. Thank you for your consideration of this request.

Sincerely,

Eligh E. Cummings

MARK DSC

Stacy Elashoff

James R. Hall

Raja Krishnamoorthi

Matthew A. Cartwright

Pali D. Kelly

Jimmy Gomez

¹⁵ *Id.*

Tom

Carolyn B. Maloney

Steph John

Brenda Laurence
M.C.

Wm. Lucy Gray

Peter Welch

Adrian P. Smith
W. H. R. T.

Bill H. Chen